A

AYER MOLEK RUBBER CO BHD

v.

MIRRA SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ABDULL HAMID EMBONG JCA
VINCENT NG JCA
[CIVIL APPEAL NO: W-02-342-2006]

C

12 DECEMBER 2007

COMPANY LAW: *Winding up - Opposition to petition - Failure to file affidavit in opposition - Whether constituted non-compliance - Whether winding up ought to be adjourned - Exercise of discretion - Right to be*

D

heard - Companies (Winding-up) Rules 1972, r. 30(1)

This was an appeal by the appellant against the decision of the learned judge ordering that the appellant be wound up. Prior to the order of winding up, judgment in default was entered against

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the appellant and a notice pursuant to s. 218 of the Companies Act 1965 issued to it. Subsequently, a winding up petition ('petition') was served on the appellant. The appellant contended that the learned judge was wrong in proceeding to dispose of the petition when there was an application for a stay of the petition

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by the appellant, pending its application to set aside the judgment in default. It was further submitted that the learned judge, in allowing the petition, had breached natural justice in not giving the appellant the right to be heard. The respondent averred that at the date of the first hearing of the winding up petition *ie*, 23

G

March 2006, no affidavit in opposition was filed. The only affidavit before the court was the one filed in support of the application for stay, at the subsequent hearing date *ie*, 13 April 2006. The appellant responded by saying that the stay application was in essence an opposition to the petition.

H

Held (dismissing the appeal)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

I

(1) The appellant had ample time (over two months) when the petition was served on it on 13 January 2006 to file an affidavit in opposition pursuant to r. 30(1) of the Companies (Winding-up) Rules 1972 ('Rules'). On 23 March 2006, when

the petition was first fixed for hearing, that affidavit in opposition had not been filed. The petition was adjourned to 13 April 2006, thus giving the appellant a further opportunity to file its affidavit in opposition, which may have been considered to be in compliance with r. 30(1) of the Rules. However, even by 13 April 2006, the appellant failed to indicate its intention to oppose the petition. Therefore, against the factual background of this instant case, the learned judge's exercise of her discretion in not adjourning the matter when it came up for hearing was correct. There was no merit in the appellant's complaint that it had been deprived of its right to be heard since it was the appellant who was entirely at fault. *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* (foll); *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* (foll). (paras 8, 9, 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim kerana memerintahkan penggulungan perayu. Sebelum perintah penggulungan dibuat, penghakiman ingkar telah diperolehi terhadap perayu dan notis di bawah s. 218 Akta Syarikat 1965 telah dikeluarkan kepada perayu. Berikutnya, satu petisyen penggulungan ('petisyen') telah diserah kepada perayu. Perayu berhujah bahawa yang arif hakim khilaf dalam meneruskan dengan petisyen dalam keadaan wujud permohonan untuk menggantung petisyen tersebut oleh perayu, sementara menunggu permohonan untuk mengenepikan penghakiman ingkar. Juga dihujahkan bahawa yang arif hakim, dalam membenarkan petisyen, telah melanggar keadilan semulajadi kerana gagal memberi perayu hak untuk didengar. Responden menegaskan bahawa pada tarikh pendengaran pertama petisyen penggulungan, iaitu pada 23 Mac 2006, tiada afidavit menentang telah difailkan. Satu-satunya afidavit di hadapan mahkamah adalah afidavit yang difailkan untuk menyokong permohonan penggantungan pada pendengaran yang berikutnya pada 13 April 2006. Perayu membalas dengan berkata bahawa permohonan penggantungan secara pentingnya adalah satu penentangan terhadap petisyen.

Diputuskan (menolak rayuan)
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

(1) Perayu mempunyai banyak masa (lebih dari dua bulan) selepas petisyen diserahkan kepadanya pada 13 Januari 2006 untuk memfail afidavit menentang berasaskan k. 30(1) Kaedah-

A Kaedah Syarikat (Penggulungan) 1972 ('Kaedah'). Pada 23 Mac 2006, bilamana petisyen ditetapkan untuk pendengaran, afidavit menentang tersebut masih belum difail. Petisyen telah ditangguhkan ke 13 April 2006, sekaligus memberikan perayu peluang kedua untuk memfail afidavit menentang, yang mungkin
B akan dianggap sebagai mematuhi k. 30(1) Kaedah. Bagaimanapun, sehingga kepada tarikh 13 April 2006 tersebut, perayu masih tidak menyatakan apa-apa hasrat untuk menentang petisyen. Oleh itu, mengambilkira latarbelakang kes semasa, penggunaan budibicara oleh yang arif hakim dengan tidak menangguhkan
C halperkara ketika ia dibentang untuk perbicaraan adalah betul. Tiada merit pada rungutan perayu bahawa ia tidak diberi hak untuk didengar kerana kesalahan terletak pada dirinya sepenuhnya. *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank* (diikuti); *Go Pak Hoong Tractor And*
D *Building Construction v. Syarikat Pasir Perdana* (diikuti).

Case(s) referred to:

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(foll)***

E *Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal [2001] 2 CLJ 457 CA* ***(refd)***

Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana [1981] 1 LNS 184 FC ***(foll)***

Re Quatrovision Pty Ltd (In Liq) 39 ALR 146 ***(refd)***

F **Legislation referred to:**

Companies Act 1965, ss. 218, 221

Companies (Winding-up) Rules 1972, r. 30(1), (2)

For the appellant - K Mohan (Sudesh Singh with him); M/s Shook Lin & Bok

G *For the respondent - B Thangaraj; M/s Thangaraj & Assoc*

[Appeal from High Court, Kuala Lumpur; Company Winding-up No: D2-28-14-2006]

Reported by Suresh Nathan

H

JUDGMENT

Abdull Hamid Embong JCA:

I

[1] The appellant had appealed against the decision of the learned judge dated 13 April 2006 ordering that the appellant be wound up.

[2] Summary Of Facts

(i) Judgment in default was entered against the appellant on 22 November 2005 and served on it on 30 November 2005.

(ii) On 8 December 2005 a notice pursuant to s. 218 Companies Act 1965 was issued to the appellant.

(iii) On 4 January 2006 a winding-up petition, D2-28-14-2006 was filed against the appellant. It was served at its registered office on 13 January 2006.

(iv) The petition was fixed for hearing on 23 March 2006 but was adjourned to 13 April 2006 because the learned judge was on medical leave on the earlier date.

(v) On 23 March 2006 the appellant filed an application to set aside the judgment in default which was fixed on 14 June 2006.

(vi) On 5 April 2006 the appellant filed a summons in chambers to stay proceedings of the winding up petition, pending the setting aside application.

(vii) On 13 April 2006 the petition came up for hearing and the learned judge ordered that the appellant be wound up.

(viii) On 15 May 2006, the appellant obtained a stay of the winding up order, pending its appeal and the appellant deposited a sum of RM2,097,315.62 into court for this purpose.

The Sole Issue

[3] Whether the learned judge was wrong in proceeding to dispose of the winding up petition when there was an application for a stay of that winding up petition (petition) pending the application to set aside the judgment.

[4] Learned counsel for the appellant submitted that the application for setting aside the default judgment was before the court at the time of hearing the winding up petition. As such "the proper, just and fair exercise of the court's discretion under s. 221 of the Companies Act required that the hearing of the petition be adjourned until the application for stay had been disposed". A passage from the case *Re Quatrovision Pty Ltd. (In Liq)* 39 ALR 146 was quoted to support this contention. It reads:

> When a challenge is made to the judgment upon which a petition to wind up a company is based, the court would not on hearing such a petition go behind the judgment, but would adjourn the petition on the undertaking of the company or opponents to the petition to commence proceedings to have the judgment set aside.

[5] It was further contended that the learned judge in so acting to allow the petition, had been in breach of natural justice in particular in not giving the appellant "the right to be heard". In support this passage from *Dr Soo Fook Mun v. Foo Fio Na & Anor And Another Appeal* [2001] 2 CLJ 457, was quoted to us:

> Nothing is clearer in adjectival law than a litigant's right to have his interlocutory applications heard and dealt with. In the present case, Dr Soo had a legitimate expectation to have his application for particulars heard and determined according to law. If he was unhappy with any decision made in respect of his application, he was entitled to appeal. The failure of the High Court to hear and determine Dr Soo's application for particulars therefore occasioned a most serious and fundamental miscarriage of justice. It not only deprived him of his basic right to have his application heard but it also deprived him of the substantive and valuable right to appeal against any decision made against him. By refusing to determine his application the High Court effectively precluded him from going further: no decision and so no appeal. The way in which the case was handled by the trial judge was an extreme example of procedural unfairness and oppression.

[6] Learned counsel for the respondent informed this court that at the date of the first hearing of the winding-up petition, ie, 23 March 2006 no affidavit in opposition was filed. The only affidavit before the court was the one filed in support of the application for stay, at the subsequent hearing date, ie, 13 April 2006. To this, learned counsel for the appellant responded that the stay application itself was in essence an opposition to the petition, to which my learned brother James Foong, JCA remarked that this submission would be considered in good light if the appellant had filed an affidavit in opposition seven days before the hearing of the petition, as required under the Rules.

[7] Rule 30(1) of the Companies (Winding-up) Rules 1972 clearly states the obligation cast upon the appellant. It states:

> 30.(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

It then opens the door to the Respondent to reply to that opposition, which together will form a basis for the winding-up court to make an appropriate order (see r. 30(2)).

[8] The appellant had ample time (over two months) when the petition was served on it on 13 January 2006.

[9] On 23 March 2006 when the petition was first fixed for hearing, that affidavit in opposition was not filed. The petition was adjourned to 13 April 2006. The appellant was thus further opportuned to file its affidavit in opposition, which we may have considered to be in compliance with r. 30(1). However even by 13 April 2006, the appellant failed to indicate its intention to oppose the petition.

[10] In the case of *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 3 CLJ 485, the appellant company had filed an affidavit in opposition three days before the first hearing date of the petition. Three other affidavits in opposition were subsequently filed. The trial judge refused to admit all the four affidavits as evidence. The appellant's appeal was dismissed and the Court of Appeal held, *inter alia,* that:

> Moreover, r. 30(1) of the 1972 Rules is mandatory in nature and therefore the judge was correct when he refused to admit all four affidavits in opposition for non-compliance of r. 30. The fact that the four affidavits were only relied upon on 24 November 1995 did not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

[11] As for the court's discretion to allow an adjournment under s. 221 Companies Act 1965, the Court of Appeal in the above case, also made this finding:

> (1) Section 221 of the Act empowers the court with the discretion to grant an adjournment, but in this case, the judge had refused to exercise his discretion and he had rightly done so for the following reason, namely, that the four affidavits supporting the company's notice of intention to oppose the petition did not comply with r. 30(1) of the 1972 Rules which states that such affidavits should be served on the petitioner or his solicitor at least seven days before the time appointed for hearing of the petition.

[12] In this appeal we too could not disagree with the learned judge's exercise of her discretion in not adjourning the matter when it came up for hearing. Against the factual background of this instant case, that discretion had been properly exercised. In *Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* [1981] 1 LNS 184, the Federal Court said:

> The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed

[13] We thus find no merit in the appellant's complaint that it had been deprived of its right to be heard. The appellant was entirely at fault here.

[14] For these reasons, this appeal was dismissed with cost. The order of the High Court dated 13 April 2006 was affirmed.